CHONG WAN KUM

v.

WAN CHOONG

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[CIVIL SUIT NO. 362 OF 1979]
4 JANUARY 1982

CONTRACT: *Action for specific performance of sale/purchase agreement - Defendant sold as executor and trustee of deceased's estate - Application for leave to sell property refused by Court - Whether defendant could have proceeded to complete sale without applying for leave of Court - Will has no restrictions as to sale of land - Whether defendant failed to perform his obligation.*

This suit was filed against the defendant for specific performance of a sale/purchase agreement dated 17 March 1973 entered into between the plaintiff and the defendant as executor and trustee of the estate of Wan Kam Fong, deceased, whereby the defendant had agreed to sell to the plaintiff land lot No. 123, s. 55, Town of Kuala Lumpur, which asset formed part of the deceased's estate for the sum of RM45,000. The plaintiff paid a deposit sum of RM4,500 towards account of the purchase price and the balance was to be paid later in accordance with the terms of the agreement. The plaintiff also claimed for the return of all sums expended by him by way of compensation to get the occupants of the land to quit which he alleged was negotiated with the consent and encouragement of the defendant. In reference to this, the statement of claim was amended with leave of the Court to include this as an alternative prayer.

As the agreement provided for the defendant to as expeditiously as possible to apply to the High Court, where the same was necessary, for the order for sale of the said property, the defendant applied to the High Court for an order to approve the sale. The High Court which granted the order on 16 November 1978 set aside this order on hearing further arguments on 30 November 1978 and refused leave for the sale of the said property. Plaintiff's Counsel submitted that the defendant could have completed the sale of the property without applying for leave of the Court and he invoked s. 60(3) & (4) of the Probate and Administration Act, 1959 and also that the will contained no restrictions as to the sale of the land. The defendant pleaded that the High Court's decision refusing leave was communicated to the plaintiff's solicitors and that he (the defendant) was bound to comply with it and had therefore been released from the agreement and the agreement was vitiated for all intents and purposes, and that he was willing to refund to the plaintiff the sum of RM4,500. The defendant also denied the allegations contained in the amended alternative prayer.

Held:

[1] Although the Court agreed that an executor may sell such asset without leave of Court, but the High Court's order dated 30 November 1978 prohibited the sale of the land and unless set aside the order was binding notwithstanding the fact that it was not necessary for the defendant to have applied for leave to sell.

[2] The plaintiff had not taken steps to intervene and to apply to set aside the order of 30 November 1978 on the ground that the permission to sell had been made unnecessarily.

[3] As the performance of the agreement of sale had been rendered impossible by the Court's order of 30 November 1978, the Court cannot comply with the plaintiff's prayer for specific performance. The defendant was however ordered to refund to the plaintiff the sum of RM4,500.

[4] The alternative prayer for an order for the return of all sums expended by the plaintiff in order to get the occupants to quit being an issue was ordered to be tried and the question of costs was reserved until trial of this issue.

[Plaintiff's claim for specific performance dismissed. Defendant ordered to refund to the plaintiff the deposit sum of RM4,500. Plaintiff's claim for return of sums expended to get the occupants to quit and question of cost reserved until trial of this issue.]

Legislation referred to:
Probate and Administration Act 1959, ss. 60(3), (4)

For the plaintiff - John Gomez; M/s. Sethu, Ghazali & Gomez
For the defendant - Paul Chua Liang Hong; M/s. L.H. Chua

JUDGMENT

Wan Hamzah J:

The defendant is the executor and trustee of the estate of Wan Kam Fong deceased. Probate of the Will was extracted in March 1972. The defendant as executor and trustee entered into an agreement dated 17 March 1973 with the plaintiff whereby he agreed to sell land lot No. 123, s. 55, Town of Kuala Lumpur, which is part of the assets of the deceased's estate, to the plaintiff for the sum of RM45,000. The plaintiff paid RM4,500 as deposit and part payment of the price, and the balance of the price was to be paid later in accordance with the terms of the agreement.

The agreement provides: "The vendor shall as expeditiously as possible make application, where the same is necessary, to the High Court in Malaya at Kuala Lumpur for the order for sale of the said property." By originating summons No. 147/1978 the defendant applied to the High Court for an order to approve the sale. On 16 November 1978 the High Court granted the order, but on hearing further arguments the High Court on 30 November 1978 set aside its order dated 16 November 1978 and refused leave to sell the said property.

The plaintiff brings this suit for specific performance of the agreement alleging that the defendant has failed to perform it. The defendant pleaded that the High Court's decision refusing leave was communicated to the plaintiff's solicitors and that he (the defendant) is bound to comply with it and has therefore been released from the agreement and the agreement is vitiated for all intents and purposes, and he is willing to refund to the plaintiff the sum of RM4,500. Learned Counsel for the plaintiff submitted that the defendant could have proceeded to complete the sale of the property without applying for leave of the Court. For this contention he invokes s. 60 (3) and (4) of the Probate and Administration Act 1959, which reads-

> (3) A personal representative may charge, mortgage or otherwise dispose of all or any property vested in him, as he may think proper, subject to any restriction which may be imposed in this behalf by the will of the deceased, and subject to this section:
>
> Provided that an executor may dispose of any property notwithstanding any restriction as imposed, if he does so in accordance with an order of the Court.

(4) An administrator may not, without the previous permission of the Court -

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situated in any State and for the time being vested in him; or

(b) lease any such property for a term exceeding five years.

It is further submitted that the will in this case contains no restrictions as to the sale of the land, which is true. I agree that an executor may sell such asset without leave of Court. But in my judgment the High Court's order dated 30 November 1978 prohibits the sale of the land and unless set aside the order is binding notwithstanding the fact that it was not necessary for the defendant to have applied for leave to sell. It appears that the plaintiff has not taken steps to intervene and to apply to set aside the order of 30 November 1978 on the ground that the application for permission to sell has been made unnecessarily.

The position now is that performance of the agreement of sale has been rendered impossible by the Court's order of 30 November 1978, and however much I sympathise with the plaintiff I do not think that I can comply with his prayer for specific performance. I therefore dismiss prayers (a) and (b) in the Statement of Claim. As regards prayer (c) I order that the defendant should refund to the plaintiff the sum of RM4,500 in accordance with Clause 7 of the agreement.

There is another issue in this case. In para 10 of the Statement of Claim the plaintiff alleges that with the consent and encouragement of the defendant, he (the plaintiff) had negotiated with the occupants of the land to quit and some of them had been persuaded to deliver vacant possession by payment of compensation. In connection with this matter the Statement of Claim was amended with leave of the Court by adding another alternative prayer for an order for the return of all sums expended by the plaintiff in order to get the occupants to quit. In para 5 of his pleading the defendant denies this allegation of the plaintiff. I therefore order that this issue be tried. I reserve decision on the question of costs until trial of this issue.

Also found at [1983] 1 CLJ 193